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No. 10-80

IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,
DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A. and
BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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Supreme Court Rule 44.2 1

Petitioner, Thomas Weiss, M.D. ("Petitioner" or "Weiss"), seeks rehearing of this Court's October 4, 2010 Order Denying his Petition for a Writ of Certiorari, pursuant to Rule 44.2 of the Supreme Court Rules.[1] Rehearing and a grant of certiorari are warranted in light of intervening circumstances of a substantial and controlling effect, and other substantial grounds not previously presented. Alternatively, for the reasons explained below, at a minimum, the Court should invite the Solicitor General's Office to submit its position on the petition in this case.

INTRODUCTION

The Weiss certiorari petition argued that the decision of the Second Circuit Court of Appeals in *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, 592 F.3d 113 (2d Cir. 2010), radically expanded the scope of "federal preemption" under *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) by finding preemption (1) based solely on letters and amicus briefs from lower level executive branch officials, rather than based on an act of federal lawmaking such as a treaty, statute, or executive agreement, and (2) applying foreign policy preemption to nullify plaintiffs' claims arising under generally applicable state common law such as contract and tort law, areas of unquestioned traditional state concern which under prior precedents including *Garamendi* would not warrant preemption under the "foreign affairs doctrine."

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1. Under Rule 44.2, this Petition for Rehearing is timely.

There are several developments which call for this Court to reconsider the denial of certiorari. First, recent decisions of three different circuit courts, including the First Circuit on October 14, directly and openly conflict with the Second Circuit's broad reading of *Garamendi*. Further, the First Circuit decision explicitly agrees with Petitioner that the view of *Garamendi* adopted by the Second Circuit was overruled by this Court's decision in *Medellin v. Texas*.

Second, this Court invited the Solicitor General to present the views of the United States in a Holocaust art case, *Von Saher v. Norton Simon Museum*, Supreme Court Case No. 09-1254, which raises one or more questions that overlap with the Weiss Petition. The issue in *Von Saher* is whether California's extended statute of limitations for Holocaust–related art claims is preempted because it focuses on restitution of property confiscated during war, which the Ninth Circuit held was a Federal government function such that "California can make 'no serious claim to be addressing a traditional state responsibility.'" *Von Saher v. Norton Simon Museum of Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010), *quoting Garamendi*, 539 U.S. at 419, n.11.

The Solicitor General's input on whether California's Holocaust art statute of limitations is a matter of traditional state competence is directly relevant to the Weiss Petition. Due to the substantial overlap in the issues presented by the two petitions, and the role the Department of Justice played in the *Generali* decision below, in the interest of fairness it would be appropriate, at a minimum, for this Court to invite the Solicitor General to provide his views on the Weiss Petition as well.

A. Subsequent Federal Appellate Decisions Highlight the Inter-Circuit Split in Applying *Garamendi*

In *Generali*, the Second Circuit rejected the admonition of *Garamendi* that generally applicable state laws addressing traditional areas of state interest are entitled to greater deference when challenged on foreign policy grounds, as compared to enactments which are meant to achieve foreign policy objectives. 539 U.S. at 420, 425-26. The Second Circuit held, contrary to *Garamendi* and contrary to three recent court of appeal decisions, that "state law must yield to the federal policy [of non-adversarial resolution of Holocaust survivors' claims], regardless of the importance of the interests behind the state law." Weiss Petition for Certiorari at 6, *quoting Generali*, 592 F.3d at 119.

Ten days after this Court denied certiorari, the First Circuit Court of Appeals reached a decision which conflicts with the Second Circuit *Generali* decision in *Museum of Fine Arts v. Seger-Thomschitz*, 2010 WL 4010121 (1st Cir. Oct. 14, 2010). In *Museum of Fine Arts*, the heir of a Jewish art collector from Austria who was persecuted by the Nazis contended that under *Garamendi*, a number of international agreements joined by the United States government supporting resolution of looted art claims based on the "facts and the merits" of the claims, rather than on legal technicalities, preempted Massachusetts' three-year statute of limitations.

The heir's claim was dismissed by the trial court because it was filed more than three years after she first

learned that a valuable painting hanging in the Boston Museum of Fine Arts was among those bequeathed to her. She relied on a "federal statute and several international declarations signed by the executive branch that touch on the subject of Nazi-looted art," and argued that under *Garamendi*, they "constitute evidence of a federal policy disfavoring the application of rigid limitations periods to claims for Nazi-looted artwork." That federal policy, she contended, was "capable of preempting the Massachusetts statute of limitations." 2010 WL 4010121, at *9.

The First Circuit rejected the plaintiff's argument because the Massachusetts law in question was a law of general applicability and represented a traditional area of state lawmaking:

> Even if there were an express federal policy disfavoring overly rigid timeliness requirements, the Massachusetts statute of limitations would not be in "clear conflict" with that policy. The Supreme Court indicated in *Garamendi* that it is appropriate to "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." 539 U.S. at 420. The enactment of generally applicable statutes of limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims. In that sense the statute in this case is unlike the law in *Garamendi*, which "effectively single[d] out

> only policies issued by European companies, in Europe, to European residents, at least 55 years ago." *Id.*, at 425-26 (distinguishing HVIRA from a "generally applicable 'blue sky' law").

2010 WL 4010121, at *11.

The First Circuit not only disagreed with the Second Circuit *Generali* decision on the ability of foreign policy to preempt generally applicable state laws, but in a footnote, explicitly agreed with Petitioner's argument that this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008) overruled *Garamendi* on the other major issue raised by the Weiss petition, i.e. the requirement of an act of federal lawmaking as an indispensable element of preemption:

> We recognize that the Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), may have cast doubt on the continuing vitality of *Garamendi*. *See, e.g., A. Mark Weisburd, Medellin, the President's Foreign Affairs Power and Domestic Law*, 28 Penn St. Int'l L.Rev. 595, 625 (2010)("One fairly clear consequence of *Medellin* is that the very broad language used in *American Ins. Ass'n v. Garamendi* no longer carries weight." (footnote omitted)).
>
> *But see In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113, 119 n. 2 (2d Cir. 2010)(concluding that *Medellin* is consistent with a broad

> understanding of *Garamendi*); *Movesesian v. Victoria Verisicherung, A.G.*, 578 F.3d 1052, 1059 (9th Cir. 2009)(acknowledging *Medellin* but nonetheless applying *Garamendi* broadly). We express no opinion on that issue. Even if the *Garamendi* doctrine retains its full force, it does not aid Seger-Thomschitz in this case.

2010 WL 4010121, note 12.

Similarly, on August 20, the Fifth Circuit Court of Appeals, in *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), rejected the argument that under *Garamendi*, international compacts supported and approved by the United States urging non-adversarial, merits-based resolution of looted art claims preempt Louisiana's generally applicable and long-standing prescription laws.

> There are key distinctions between this case and *Garamendi*. In *Garamendi*, California was essentially pursuing independent policy objectives in favor of Holocaust victims. . . . In this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. La Civ. Code art 3544 (1870); La Civ.Code art. 3506 (1870). Louisiana's laws are well within the realm of traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these

> prescriptive laws, Louisiana has not infringed on any exclusive federal powers. . . . The type preemption established by *Garamendi* is thus inapplicable; Louisiana's prescriptive laws are not preempted by the Terezin Declaration, U.S. foreign policy, or the President's foreign affairs powers.

Id., at 579.[2]

On August 31, 2010, the Eleventh Circuit Court of Appeals also applied *Garamendi* differently than the Second Circuit in rejecting a foreign affairs preemption challenge to a Florida law prohibiting expenditures for travel by state employees to countries the U.S. government had listed as State Sponsors of Terrorism. In *Faculty Senate of Florida International University v. Winn*, 616 F.3d 1206 (11th Cir. 2010), the court held:

> No clear conflict between federal policy and state law à la *Garamendi* is presented here. But, even if some indistinct desire on the part of the Executive Branch or Congress to encourage generally academic travel has been shown, the strength of Florida's traditional state interest in managing its own spending

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2. The Fifth Circuit in *Dunbar* cites the Louisiana prescription statutes that date back to 1870 as examples of a law expressing traditional state interest of general applicability. Similarly, Florida's tradition of access to courts for common law claims has been enshrined in the Florida Constitution since 1833. *See, e.g. Psychiatric Assoc. v. Siegel*, 610 So.2d 419 (Fla. 1992); *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 902 (Fla. 3d DCA 1977).

> and the scope of its academic programs is sufficient to overcome the conflict given the lack of the conflict's clarity and severity. *See [Garamendi]* at 2389 ("[I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.").

Id., at 1211.

Consequently, Petitioner urges this Court to revisit its denial of certiorari of October 4, and grant review of the Second Circuit decision below.

B. This Court Should At a Minimum Require the Solicitor General to Address Petitioner's Certiorari Arguments.

On the same day this Court denied certiorari in *Weiss v. Generali*, it invited the Solicitor General to "file a brief in this case expressing the views of the United States" in *Marei Von Saher v. Norton Simon Museum of Pasadena*, Case No. 09-1254. The issue presented by the Petitioner in *Van Saher* revolves around one of the same questions raised by Weiss under *Garamendi*, i.e. the nature of the state law rights which are alleged to be in conflict with U.S. "foreign policy," and the relative weight to be accorded the state law in consideration of the particular U.S. foreign policy asserted.

In *Von Saher*, the Ninth Circuit held that the California statute extending the statute of limitations

for Holocaust survivors' and heirs' art claims was "not an area of 'traditional state responsibility'" and subjected the law to a field preemption analysis. *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 965 (9th Cir. 2010), citing *Garamendi*, 539 U.S. at 419 n. 11.

The Solicitor General will therefore be offering his views on the question above, an issue on which three other circuit courts of appeal have disagreed with the Second Circuit, which gave absolutely no weight to Florida's long-standing common law contract and tort remedies in the face of the United States government's assertion of a "foreign policy conflict," despite the injunction in *Garamendi* requiring the court "to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."). *See* 539 U.S. at 420; Weiss Petition, at 6, citing 539 U.S. at 425-26.

The Second Circuit's decision in *Generali* was based *entirely* on its broad reading of *Garamendi* and two letters from the Department of Justice in 2008 and 2009. The letters were written in response to the Court's questions, in the face of a record that the Clinton Administration in 2000 and 2001 rejected any foreign policy interest in Generali's favor, asking whether litigation under state law against Generali conflicted with U.S. foreign policy. The submissions of the Department of Justice *created and defined* the statements of U.S. foreign policy that formed the basis of the Court's decision.

Interestingly, the DOJ itself explicitly recognized that there was a difference for preemption purposes whether the state law involved was similar to California's HVIRA touching on foreign policy, or whether the plaintiffs were asserting common law claims. DOJ took no position "on whether plaintiffs' claims are preempted by its foreign policy in light of *American Insurance Ass'n v. Garamendi*, . . . except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), which, as the supreme Court held in *Garamendi*, impermissibly impede the conduct of foreign policy and are thus preempted." Letter Brief of United States Department of Justice, October 30, 2008, at 2, Weiss Petition App. 57a.

The Department's role in the statement of U.S. policy and its effect on preemption in the Second Circuit is important for another reason. There is now a substantial public controversy arising out of DOJ's efforts to suppress documents recently produced under the Freedom of Information Act (FOIA) and introduced in a Congressional hearing, which admit that DOJ knew it was misrepresenting U.S. policy to the Second Circuit, and also withheld its views expressing profound doubts about the soundness of Judge Mukasey's original decision dismissing plaintiffs' – the very result reached by the Second Circuit.

On September 22, 2010, in a hearing in the House of Representatives Judiciary Committee Subcommittee on Commercial and Administrative Law on legislation that would overrule *Garamendi* and the *Generali* decisions (HR 4596), Congressman Adam Schiff stated:

> Let me quote briefly from a document that was recently obtained through a Freedom of Information Act request. It was written by an attorney in the Solicitor General Office at the Department of Justice. In it, the attorney writes [regarding Judge Mukasey's original decision dismissing the plaintiffs' claims, whose affirmance is addressed in the Weiss Petition]: "On the merits, I have some reservations about the legal theory on which the district court dismissed the plaintiffs' common law claims. . . . As a general matter, 'Executive Branch Actions' that 'express federal policy but lack the force of law' do not preempt state law. While Garamendi may reflect an exception to that general rule, that principle is still subject to some doubt." I could hardly say it better myself.

Statement of Congressman Adam Schiff, September 22, 2010, Hearing on H.R. 4596, the "Holocaust Insurance Accountability Act of 2010;"http://judiciary.house.gov/hearings/hear_100922.html.

Two days after the hearing, DOJ contacted the attorney representing the survivors and heirs of survivors who requested the documents and demanded that they be "returned." *See* Amy Biegelsen, "DOJ Releases, Then Tries to Reel In, Documents In Holocaust Case," *Center for Public Integrity*, October 13, 2010, http://www.publicintegrity.org/articles/entry/2522/.

Under the circumstances, since this Court has invited the Solicitor General to present the views of the United States on the preemption issues raised in *Von Saher*, and given the clear overlap in the issues and the Department's role in the Second Circuit decision below, Petitioner requests that this Court at a minimum request an explanation from the Solicitor General about the issues raised in the Weiss Petition.

Respectfully Submitted,

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

